

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION**

EDGAR ULLOA LUJAN, *et al.*,

Plaintiffs,

v.

U.S. DEPARTMENT OF EDUCATION,
et al.,

Defendants.

No. 3:22-cv-00159-DCG

DEFENDANTS' UNOPPOSED MOTION TO STAY

Defendants respectfully request that the Court stay this case pending resolution of ongoing rulemaking proceedings, the conclusion of which will amend the challenged regulation, 34 C.F.R. § 662.21(c)(3). Counsel for Defendants have consulted with counsel for Plaintiffs, who have stated that they do not oppose this motion. Good cause supports this request for the following reasons.

1. This case concerns a Department of Education (the “Department”) regulation implementing the Fulbright-Hays Doctoral Dissertation Research Abroad (“DDRA”) Fellowship Program, which provides that the Secretary will “review[] each application to determine the qualifications of the applicant” on the basis of several factors, including “[t]he applicant’s proficiency in one or more of the languages (other than English and the applicant’s native language) of the country or countries of research, and the specific measures to be taken to overcome any anticipated language barriers.” 34 C.F.R. § 662.21(c)(3) (the “Foreign Language

Criterion”). Plaintiffs’ complaint seeks to vacate the part of the Foreign Language Criterion that excludes consideration of applicants’ proficiency in their “native language.” ECF No. 25.

2. On January 3, 2023, Plaintiffs filed a Motion for Preliminary Injunction, asking the Court to order two forms of relief: (1) “requiring Defendants to reevaluate Plaintiff Gonzalez’s 2022 application for the DDRA fellowship without applying [the Foreign-Language Criterion]”; and (2) “requiring Defendants to suspend [the Foreign-Language Criterion] for the 2023 application cycle” so that applicants can apply without facing the ‘native language penalty.’” ECF No. 25 at 1. On March 24, 2023, the Court denied the preliminary injunction with respect to the 2022 application cycle, and granted it with respect to the 2023 application cycle. ECF No. 37. Specifically, the Court “vacat[ed] 34 C.F.R. § 662.21(c)(3) as to all 2023 Fulbright-Hays Fellowship applicants until the Court reaches a merits decision in this case or the U.S. Department of Education publishes a final rule amending the regulation.” ECF No. 37. On April 3, 2023, the Court clarified that Defendants are enjoined from applying the Foreign Language Criterion “only insofar as the Foreign Language Criterion prohibited considering an applicant’s native language skills.” ECF No. 40.

3. In accordance with the Court’s Orders, Defendants have announced that they “will consider the criterion set forth in 34 C.F.R. § 662.21(c)(3) in the Fulbright-Hays 2023 competition cycle, including awarding points to applicants based on relevant native language skills (other than English).” U.S. Dept. of Ed., DDRA Program Announcements, *available at* <https://www2.ed.gov/programs/iegpsddrap/index.html>. Defendants further announced that “[t]he Department will [] increase the number of points associated with this selection criterion from 1 point to 10 points” for the 2023 application cycle. *Id.* The Department intends to publish a formal notice to amend the Notice Inviting Applications for the 2023 competition cycle to reflect these

changes in the coming weeks. *Id.* Finally, the Department has extended the deadline for 2023 DDRA program applications to April 28, 2023, in order to allow time for these changes to be implemented. *Id.*

4. On March 21, 2023, the Department published a notice of proposed rulemaking (“NPRM”) in the Federal Register, which proposes to amend the Foreign Language Criterion. 88 Fed. Reg. 16,924 (2023). The proposed rule would amend 34 C.F.R. § 662.21(c)(3) in a manner that makes applicants eligible for the full amount of points allocated to the criterion based on any relevant language in which they have proficiency, other than English, including their native language. *Id.* The Department provided the public 30 days to comment on its proposed rule, which period concludes on April 20, 2023. Once the comment period is complete, the Department will review any comments received and draft a final rule, which will then proceed to the requisite executive branch components for review and approval before being published and implemented.

5. Because this rulemaking process is likely to result in repeal or revision of the challenged part of Foreign Language Criterion, the final rule may moot or otherwise resolve this litigation, or else require amendments to Plaintiffs’ complaint. Staying the litigation while Defendants conduct rulemaking regarding that aspect of the Foreign Language Criterion would therefore conserve judicial resources, the time of and expense to the parties, and potentially avoid the need for further litigation.

6. At the same time, no prejudice will result from a stay of these proceedings while the ongoing rulemaking is completed. The Court’s preliminary injunction already provides the relief Plaintiffs seek for the current 2023 application cycle. And the rulemaking is anticipated to be completed well before the 2024 application cycle, which is approximately a year away.

7. Counsel for the Plaintiffs has informed counsel for the Defendants that Plaintiffs consent to the requested stay.

WHEREFORE, the Defendants respectfully request that that the Court stay this litigation until 30 days after publication of the forthcoming final rule amending 34 C.F.R. § 662.21(c)(3).

Dated: April 11, 2023

Respectfully submitted,

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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify on this 11th day of April, 2023, a true and correct copy of this document was served electronically by the Court's CM/ECF system to all counsel of record.

/s/ Emily B. Nestler
Emily B. Nestler